No. 823

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, APPELLANT

v.

PAUL EVANS

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Southern District of California, Central Division

Criminal No. 18848

UNITED STATES OF AMERICA

v.

PAUL EVANS

STATEMENT AS TO JURISDICTION

(Filed Nov. 8, 1946. Edmund L. Smith, Clerk, by Wm. A. White, Deputy Clerk)

In compliance with Rule 37 (a) (1) of the Federal Rules of Criminal Procedure and Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause October 10, 1946, dismissing the indictment.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by the Act of March 2, 1907, 34 Stat. 1246, as amended by the Act of

May 9, 1942, 56 Stat. 271, 18 U. S. C., Supp. V, 682, commonly known as the Criminal Appeals Act, and by Section 238 of the Judicial Code, 28 U. S. C. 345.

STATUTE INVOLVED

Section 8 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 880, 8 U. S. C. 144, provides:

> Any person, including the master, agent, owner, or consignee of any vessel, who shall bring into or land in the United States, by vessel or otherwise, or shall attempt, by himself or through another, to bring into or land in the United States, by vessel or otherwise, or shall conceal or harbor or attempt to conceal or harbor, or assist or abet another to conceal or harbor, in any place, including any building, vessel, railway car, conveyance, or vehicle, any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States under the terms of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $2,000 and by imprisonment for a term not exceeding five years, for each and every alien so landed or brought in or attempted to be landed or brought in.

THE ISSUE AND THE RULING BELOW

Joe V. Roberts and Paul Evans, were charged in an indictment filed in the District Court on

September 4, 1946, with having violated Section 8 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 880, 8 U. S. C. 144, in that on or about June 22, 1946, they concealed and harbored and attempted to conceal and harbor certain named alien persons who were not duly admitted to the United States by an immigrant inspector and not lawfully entitled to enter or reside in the United States, as the defendants well knew. Both defendants entered pleas of not guilty. On October 8, 1946, defendant Roberts withdrew his plea of not guilty and entered a plea of guilty. On October 9, 1946, defendant Evans filed a motion to dismiss the indictment on the ground that it did not state facts sufficient to constitute a punishable offense against the United States. On Ocober 10, 1946, the court (Judge Hall) granted the motion to dismiss "on the ground that the statute [on which the indictment was based] does not provide a penalty for harboring and concealing, which is the only thing charged in the indictment."[1]

It is clear, therefore, that the order dismissing the indictment was based upon a construction of the statute on which the indictment was founded,

[1] On October 11, 1946, defendant Roberts moved in arrest of judgment in view of the dismissal of the indictment as to Evans. The court deferred ruling on the motion, ordering that the case be taken off the calendar, subject to be restored on motion of the United States Attorney, and ordered that Roberts remain at liberty on his present bond until notified by the United States Attorney to appear before the court for further proceedings in regard to sentence.

and hence, is subject to review by the Supreme Court on direct appeal. *United States* v. *Borden Co.*, 308 U. S. 188; *United States* v. *Rosenwasser*, 323 U. S. 360.

THE QUESTION IS SUBSTANTIAL

The contention that Section 8 of the Immigration Act of 1917, *supra*, does not provide a penalty for concealing, harboring, or attempting to conceal or harbor aliens not duly admitted by an immigrant inspector or not lawfully entitled to enter or reside within the United States is based on the fact that, notwithstanding the statute specifically describes these acts as offenses, the penal clause reads:

> * * * and upon conviction thereof shall be punished by a fine not exceeding $2,000 and by imprisonment for a term not exceeding five years, *for each and every alien so landed or brought in or attempted to be landed or brought in.* [Italics supplied.]

Although this contention has been accepted in earlier decisions in the District Court for the Southern District of California (*United States* v. *Niroku Komai*, 286 Fed. 450;[2] *United States* v.

[2] The court's opinion in the *Niroku Komai* case that concealing and harboring were not made punishable by the section was *dictum*, however; for, notwithstanding its opinion that concealing and harboring were not made punishable, the holding was that conspiracy to conceal and harbor was punishable under Section 37 of the Criminal Code, 18 U. S. C. 88.

Kinzo Ichiki, 43 F. 2d 1007), it thereafter was squarely rejected by the Circuit Court of Appeals for the First Circuit in *Medeiros* v. *Keville*, 63 F. 2d 187 (C. C. A. 1), certiorari denied, 289 U. S. 746. The decision in this case is, thus, in conflict with the only appellate decision on the question.

The construction of the section adopted by the District Court in this case and in the *Niroku Komai* and *Kinzo Ichiki* cases seems clearly erroneous. While the rule is that penal statutes should be strictly construed in favor of the accused, the plainly expressed legislative intent must be effectuated in penal as well as other statutes; a statute should not be given a forced and highly technical construction which would defeat one of its primary objects merely because it is penal in nature. *Singer* v. *United States*, 323 U. S. 338, 341–342; *United States* v. *Raynor*, 302 U. S. 540, 552; *United States* v. *Giles*, 300 U. S. 41, 48; *Donnelley* v. *United States*, 276 U. S. 505, 512; *Ash Sheep Co.* v. *United States*, 252 U. S. 159, 170; *United States* v. *Corbett*, 215 U. S. 233, 242; *United States* v. *Lacher*, 134 U. S. 624, 628; *United States* v. *Hartwell*, 6 Wall, 385, 395–396; *United States* v. *Morris*, 14 Pet. 464, 475; *United States* v. *Wiltberger*, 5 Wheat, 76, 95; *United States* v. *Winn*, 3 Sumner 209, 211–212. The District Court's construction of the section in question imputes to Congress a wholly purposeless resolve in inserting in Section 8 of the Im-

migration Act of February 5, 1917 the clause prohibiting the concealing and harboring of aliens who have been brought into this country unlawfully. These provisions are complementary to the other provisions relating to the smuggling of aliens. If the section is read in that light, it is evident that Congress meant that punishment should be inflicted for all of the related offenses denounced by the section. It is unreasonable to conclude that Congress proscribed the concealing and harboring of the described aliens, but that it did not intend to punish a person who concealed or harbored such an alien. The District Court's construction would defeat the manifest purpose of the legislation.

Appended hereto is the "minute order" of the District Court of October 10, 1946, disclosing the ground of the court's decision.

Respectfully submitted.

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Acting Solicitor General.

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